

This is a claim for a July 10, 2002, accident. In the May 15, 2006, Award, Judge Hursh found claimant's injuries from that accident were limited to his left shoulder. Averaging ratings provided by Dr. C. Craig Satterlee and Dr. Edward J. Prostic, the Judge concluded claimant sustained a 15.5 percent permanent disability to the left arm at the shoulder level and, therefore, awarded claimant benefits under the schedules of K.S.A. 44-510d.

Claimant contends Judge Hursh erred. Claimant argues he sustained permanent injury to both shoulders and his low back as a result of the July 2002 accident and that he is entitled under K.S.A. 44-510e to receive a work disability (a permanent partial general disability greater than the whole person functional impairment rating). Accordingly, claimant requests the Board to modify the May 15, 2006, Award and grant him benefits for a 52 percent permanent partial general disability.

Respondent and its insurance carrier contend Judge Hursh correctly determined claimant injured only his left shoulder in the July 2002 accident and they ask the Board to affirm the Award. Moreover, respondent and its insurance carrier argue claimant failed to prove a wage loss related to his injury or a valid task loss and, therefore, claimant would not be entitled to receive a work disability.

The only issue before the Board on this appeal is the nature and extent of claimant's injury and disability.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the entire record and considering the parties' arguments, the Board finds and concludes the Award should be affirmed except as modified below.

The Board adopts the findings and conclusions of Judge Hursh as set forth in the Award. In short, the Board concludes claimant failed to prove he permanently injured his right shoulder or low back in the accident. As determined by the Judge, claimant initially experienced right shoulder and left knee symptoms following his July 10, 2002, truck accident. Claimant, however, testified that those symptoms resolved. Indeed, claimant did not experience right shoulder symptoms again until more than two years after the accident when he began working for another employer in the fall of 2004.

The expert medical opinions do not support the claim for a permanent right shoulder injury. Claimant was not having any right shoulder complaints when he first saw his medical expert witness, Dr. Edward J. Prostic, in January 2003. Likewise, claimant was not having any right shoulder problems when he saw Dr. Kevin D. Komes in February 2003, Dr. Steven L. Hendler in August 2003, or while treating with Dr. C. Craig Satterlee for approximately seven months commencing March 2004.

According to Dr. Satterlee, the orthopedic surgeon who operated on claimant's left shoulder, in October 2004 claimant spoke of his progress in physical therapy as he had been doing pull-ups, one-armed push-ups with each arm, and pushing a 1,000-pound sled.

Moreover, Dr. Prostic admits when he saw claimant a second time in December 2004 that it was not clear in his mind that claimant's newly emerged right shoulder

symptoms should be attributed to the July 2002 accident or to claimant's new employment. The doctor also suggested claimant was a poor historian. But, more importantly, Dr. Prostic candidly admitted that he was unable within a reasonable degree of medical probability to relate claimant's right shoulder impairment to the truck accident.

Likewise, the record fails to establish that claimant injured his low back in the truck accident. First, there is no indication that claimant had low back complaints before January 2003, when claimant saw his medical expert witness, Dr. Prostic. And the timing of those complaints is problematic as claimant testified in a deposition the day before Dr. Prostic's January 2003 examination that he was only having problems with his left shoulder. In addition, Dr. Komes examined claimant in late February 2003 and the doctor concluded claimant had a normal examination as there were no objective findings to substantiate his subjective complaints. And Dr. Hendler's examination in August 2003 did not reveal any findings to support a low back injury.

Furthermore, Dr. Hendler testified claimant had tenderness to superficial palpation, which suggested a non-physiologic response. And, more importantly, Dr. Hendler could not comprehend how the preexisting disc space narrowing or degenerative condition in claimant's back could have been aggravated considering the type of accident that claimant sustained. And even Dr. Prostic thought that most, if not all, of the abnormal findings he obtained were present before claimant's rollover accident.

The evidence fails to establish it is more probably true than not that claimant's present problems with his back and right shoulder were caused by his July 2002 accident. Consequently, the Board affirms the award of permanent disability benefits for a 15.5 percent disability to the left arm at the shoulder. The Judge derived that rating by averaging the 16 percent impairment to the left arm provided by Dr. Prostic with the 15 percent impairment to the left arm provided by Dr. Satterlee.

While reviewing the Division's administrative file, the Board discovered that attorney Timothy A. Short of Pittsburg, Kansas, had filed a statement of attorney fee lien. The file fails to indicate whether that matter has been addressed. Accordingly, the approval of attorney fees entered by Judge Hursh should be modified to make that approval subject to Mr. Short's lien.

### **AWARD**

**WHEREFORE**, the Board modifies the May 15, 2006, Award entered by Judge Hursh to subject the approval of attorney fees to Mr. Short's lien. The remainder of the Award is affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of September, 2006.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Crystal D. Marietta, Attorney for Claimant  
Timothy A. Short, Former Attorney for Claimant  
Christopher J. McCurdy, Attorney for Respondent and its Insurance Carrier